

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

On October 2, 2002, Petitioner Saifullah Durrani (“Petitioner”) was charged in a three-count Indictment with: 1) Conspiracy to Distribute Heroin and Hashish, in violation of Title 21, United States Code, §§ 846 and 841(a)(1); Conspiracy to Import Heroin and Hashish, in violation of Title 21, United States Code, §§ 852, 960, and 963; and 3) Providing Material Support to a Terrorist Organization, in violation of Title 18, United States Code, § 2339B. On March 3, 2004, pursuant to a written plea agreement, Petitioner pleaded guilty to Counts One and Three of the Indictment.

24 On April 24, 2006, Petitioner filed a motion pursuant to 28 U.S.C. § 2255 to vacate, set aside
25 or correct sentence. Respondent filed a response and opposition. No reply was submitted by
26 Petitioner, and the time for doing so has expired. The Court has reviewed the record, the
27 submissions of the parties, and the supporting exhibits and, for the reasons set forth below, will
28 **DISMISS** Petitioner's motion.

ANALYSIS

In the instant motion brought under 28 U.S.C. § 2255, Petitioner contends that: 1) Petitioner's guilty plea was not knowingly and intelligently entered nor voluntary; 2) Petitioner's attorney did not provide him with a "viable defense;" 3) Petitioner was the victim of an illegal search; and 4) Petitioner was "kidnapped" from Hong Kong. Petitioner, however, fails to provide any factual or legal bases for his claims. Instead, Petitioner promises to provide a factual basis for all of his allegations in a "memorandum of points and authorities" to be filed at a later time. To date, no such memorandum has been filed.

Nevertheless, under the terms of the plea agreement, Petitioner agreed to waive any right to appeal, or to collaterally attack his conviction and sentence, unless the Court imposed a custodial sentence greater than the high end of the guideline range recommended by the Government pursuant to the plea agreement. *See Plea Agreement ¶ XI.*¹ During the plea proceedings, Petitioner clearly acknowledged that he understood, that by entering the plea agreement, he was waiving his rights to appeal and collateral attack. Petitioner was sentenced to fifty-seven months in custody, five years of supervised release and a \$100 mandatory assessment on Count One; and fifty-seven months in custody, three years supervised release, and a \$100 mandatory assessment on Count Three, to run concurrent with Count One. *See Amended Judgment filed 5/10/06.*

Because Petitioner does not challenge the validity of the waiver, the Court finds that the waiver should be enforced. A knowing and voluntary waiver of a statutory right is enforceable. *United States v. Navarro-Botello*, 912 F.2d 318, 321 (9th Cir. 1990). The right to collaterally attack a sentence under 28 U.S.C. § 2255 is statutory in nature, and a defendant may therefore waive the right to file a § 2255 petition. See, e.g., *United States v. Abarca*, 985 F.2d 1012, 1014 (9th Cir. 1993) (by entering plea agreement waiving right to appeal sentencing issues, defendant relinquished

In exchange, the Government agreed to dismiss Count Two and to make the following recommendations: a three level sentencing adjustment for acceptance of responsibility on each remaining count; a two level reduction and relief from any statutory mandatory minimum sentence on Count One if Petitioner truthfully disclosed all relevant information and evidence and otherwise qualified under § 5C1.2 for such relief; and a sentence at the low end of the guideline range.

See Plea Agreement ¶ I, X.

1 his right to seek collateral relief from his sentence on the ground of newly discovered exculpatory
2 evidence).

3 The scope of a § 2255 waiver may be subject to potential limitations. For example, a
4 defendant's waiver will not bar an appeal if the trial court did not satisfy certain requirements under
5 Rule 11 of the Federal Rules of Criminal Procedure to ensure that the waiver was knowingly and
6 voluntarily made. *Navarro-Botello*, 912 F.2d at 321. Such a waiver might also be ineffective where
7 the sentence imposed is not in accordance with the negotiated agreement, or if the sentence imposed
8 violates the law. *Id.*; *United States v. Littlefield*, 105 F.3d 527, 528 (9th Cir. 1996). Finally, a
9 waiver may not "categorically foreclose" defendants from bringing § 2255 proceedings involving
10 ineffective assistance of counsel or involuntariness of waiver. *Abarca*, 985 F.2d 1012, 1014;
11 *United States v. Pruitt*, 32 F.3d 431, 433 (9th Cir. 1992). In this case, none of these potential
12 limitations on the validity of Petitioner's waiver are applicable. First of all, the record indicates that
13 Petitioner knowingly and voluntarily entered into the Plea agreement and that the requirements of
14 Rule 11 were adhered to. Secondly, the sentence imposed by the Court was in accordance with the
15 negotiated agreement, and in accordance with the applicable sentencing guidelines.

16 With respect to Petitioner's ineffective assistance of counsel claim, the Sixth Amendment
17 to the Constitution provides that every criminal defendant has the right to effective assistance of
18 counsel. In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court enunciated the test
19 for determining whether a criminal defendant's counsel rendered ineffective assistance. In order to
20 sustain a claim of ineffective assistance of counsel, the petitioner has the burden of showing both:
21 1) that his defense counsel's performance was deficient; and, 2) that this deficient performance
22 prejudiced his defense. *Strickland* 466 U.S. at 690-92; *Hendricks v. Calderon*, 70 F.3d 1032, 1036
23 (9th Cir. 1995).

24 To satisfy the deficient performance prong of the *Strickland* test, the Petitioner must show
25 that his counsel's advice was not "within the range of competence demanded of attorneys in criminal
26 cases." *Hill v. Lockhart*, 474 U.S. 52, 56 (1985). In considering this issue, there is a "strong
27 presumption that counsel's conduct falls within a wide range of acceptable professional assistance."
28 *Strickland*, 466 U.S. at 689. Moreover, *post-hoc* complaints about the strategy or tactics employed

1 by defense counsel are typically found to be insufficient to satisfy the first prong of *Strickland*. See,
2 e.g., *United States v. Simmons*, 923 F.2d 934, 956 (2nd Cir. 1991) (appellant's displeasure with
3 strategy employed by trial counsel insufficient to establish ineffectiveness). To satisfy the second
4 prong, a section 2255 petitioner must show that he was prejudiced by the deficient representation
5 he received. The focus of the prejudice analysis is on whether the result of the proceeding was
6 fundamentally unfair or unreliable because of counsel's ineffectiveness. *Lockhart v. Fretwell*, 506
7 U.S. 364, 369 (1993). Here, Petitioner has not identified any aspect of his trial counsel's
8 performance that could be considered outside the range of competence demanded of attorneys in
9 criminal cases.

10 The Court finds that none of the recognized limitations to a defendant's waiver of the right
11 to bring a § 2255 motion are present in this case. Accordingly, the collateral attack waiver provision
12 in Petitioner's plea agreement will be enforced.

13 **CONCLUSION**

14 For the reasons set forth above, the Court finds that Petitioner has waived his right to
15 collaterally challenge his conviction and sentence in this matter. Accordingly, Petitioner's Motion
16 to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255 is **DISMISSED WITH**
17 **PREJUDICE**.

18 **IT IS SO ORDERED.**

19 DATED: March 27, 2008

20 
21 M. James Lorenz
United States District Court Judge

22
23 COPY TO:

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